

1902542 (Migration) [2021] AATA 2551 (20 April 2021)

DECISION RECORD

DIVISION:	Migration & Refugee Division
CASE NUMBER:	1902542
MEMBER:	Margie Bourke
DATE:	20 April 2021
PLACE OF DECISION:	Melbourne
DECISION:	The Tribunal remits the application for a Partner (Provisional) (Class UF) visa for reconsideration, with the direction that the visa applicant meets the following criteria for a Subclass 309 (Partner (Provisional)) visa: • cl.309.211 and cl.309.221 of Schedule 2 to the Regulations.

Statement made on 20 April 2021 at 4:13pm

CATCHWORDS

MIGRATION – Partner (Provisional) (Class UF) visa – subclass 309 (Spouse (Provisional)) – applicants are currently in a genuine spousal relationship – evidence of long-term commitment to a spousal relationship – marriage is valid for the purposes of the Act – decision under review remitted

LEGISLATION

Family Law Act 1975 (Cth)

Migration Act 1958 (Cth), ss 5F, 65, 360

Migration Regulations 1994 (Cth), r 1.15A, Schedule 2, cls 309.211, 309.221

CASES

He v MIBP [2017] FCAFC 206

Any references appearing in square brackets indicate that information has been omitted from this decision pursuant to section 378 of the Migration Act 1958 and replaced with generic information.

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision made by a delegate of the Minister for Immigration on 18 January 2019 to refuse to grant the visa applicant a Partner (Provisional) (Class UF) visa under s.65 of the *Migration Act 1958* (the Act).
2. The visa applicant applied for the visa on 8 August 2017 on the basis of her relationship with her sponsor, the review applicant. At that time, Class UF contained only one subclass: Subclass 309 (Partner (Provisional)). The criteria for the grant of this visa are set out in Part 309 of Schedule 2 to the Migration Regulations 1994 (the Regulations). The primary criteria must be satisfied by at least one applicant. Other members of the family unit, if any, who are applicants for the visa need satisfy only the secondary criteria.
3. The delegate refused to grant the visa on the basis that the visa applicant did not satisfy cl.309.211 because the delegate found the parties had not provided sufficient evidence to demonstrate the visa applicant was the spouse of the sponsor at the time of application.
4. The tribunal has considered the information that was available to the Department, and the matters recorded in the Departments decision record dated 18 January 2019. The tribunal has also considered the extensive information that has been provided to the tribunal in support of the application for review. The tribunal has decided that based on the information available to it, can make a decision favourable to the visa applicant without proceeding to a hearing, pursuant to s.360(2)(a) of the Act.
5. The following are the written reasons that the tribunal has concluded that the matter should be remitted back to the Department for reconsideration.

CONSIDERATION OF CLAIMS AND EVIDENCE

SPOUSE/DE FACTO (cl.309.211(2), cl.309.221)

Whether the parties are in a spouse or de facto relationship

6. Clause 309.211(2) and 309.221 require that at the time the visa application was made, and at the time of this decision, the visa applicant is the spouse or de facto partner of an Australian citizen or Australian permanent resident or an eligible New Zealand citizen. Based on the review applicant's Australian issued passport, and the information recorded in the Departments decision record that he is an Australian citizen, the tribunal is satisfied that the review applicant is an Australian citizen. In the present case the visa applicant claims to be the spouse of the review applicant who is an Australian citizen.
7. 'Spouse' is defined in s.5F of the Act and provides that a person is the spouse of another where the two persons are in a married relationship. Persons in a married relationship must be married to each other under a marriage that is valid for the purposes of the Act, there must be a mutual commitment to a shared life as a married couple to the exclusion of all others, the relationship must be genuine and continuing, and the couple must live together, or not live separately and apart on a permanent basis: s.5F(2)(a)-(d). In forming an opinion about these matters, regard must be had to all of the circumstances of the relationship. This includes evidence of the financial and social aspects and the nature of the visa applicant's and review applicant's household and their commitment to each other as set out in r.1.15A(3), which is extracted in the attachment to this decision. Each of the specific matters

contained in r.1.15A(3) are effectively questions which must be answered: *He v MIBP*[2017] FCAFC 206.

Are the parties validly married?

8. If the parties are validly married, they may meet the requirements of a married relationship, but not a de facto relationship. Based on the marriage certificate registered under the Punjab Compulsory Registration of Marriage Act 2012 I am satisfied the review applicant and visa applicant were married on [date] June 2017 and the marriage was registered on [date] June 2017 in India. I have considered the two divorce documents provided by the review applicant in relation to his two previous marriages, recorded under the Family Law Act 1975 in April 2010 and March 2017.
9. On the evidence before the tribunal I am satisfied that the parties were married to each other under a marriage that is valid for the purposes of the Act as required by s.5F(2)(a).
- 10.

Are the other requirements for a spouse relationship met?

11. This is an application for a subclass 309 visa, and in assessing whether the visa applicant is the spouse of the review applicant at the time of application, and continues to be the spouse of the review applicant at the time of decision within the meaning of s.5F(2) to satisfy the requirements of both cl.309.211 and cl.309.221, the tribunal must consider the circumstances of the relationship as set out in r.1.15A(3). The tribunal is mindful when assessing the circumstances of the relationship that the visa applicant and the review applicant reside in separate countries.
12. *Financial aspects of the relationship:-* I am satisfied based on the information provided to the tribunal that the review applicant owns real estate, the home in which he resides, in Australia. I am further satisfied based on documents dated 14 February 2020 that the review applicant had owned the house and land in the village of [name deleted], and had transferred that real estate into his wife, the visa applicant's name. Although the parties do not jointly own major assets including real estate, I am satisfied that the transfer of ownership of property from the review applicant to the visa applicant while she remained residing in India is a strong indication that the financial aspects of the relationship indicate the relationship is genuine and continuing. I am satisfied that this evidence also indicates that the parties pool their financial resources.
13. There is no evidence before the tribunal that either the review applicant or the visa applicant has any legal obligations owed to each other. There is no evidence before the tribunal that the parties jointly have liabilities or debts together.
14. I am satisfied that the visa applicant was educated at university and then was employed from 1998 until 2011, based on the information she has provided to the tribunal. I am satisfied that since the visa applicant's marriage to the review applicant, she has been financially supported by the review applicant. I am satisfied that the review applicant is employed in Australia. I am satisfied that the parties have a joint bank account and money is transferred between them for their joint use. I am therefore satisfied based on the written and oral evidence presented to the tribunal that the parties share their day-to-day household expenses, and I accept that the household expenses relate to expenses incurred in two separate households as the parties reside in different countries.
15. The evidence of the financial aspects of the relationship indicate that the review applicant and visa applicant are in a genuine and continuing relationship.

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17. *Nature of the household:-* I am satisfied that the review applicant and the visa applicant do not have joint responsibility for the care and support of children. I am satisfied that the parties lived together at the review applicant's parents' house in India after their marriage and for intermittent periods of a month or more when the review applicant can travel to India. I accept that in the review applicant's parents' house the responsibility for housework is undertaken by the women, and some housework is undertaken by employed staff. I am satisfied that the evidence of the nature of the household before the tribunal is limited, however the evidence of the living arrangements is that the parties have resided together at the review applicant's parents' house, and that the visa applicant has continued to reside at the home of the review applicant's parents after the review applicant returns to Australia.
18. I accept this evidence, and I find that the evidence of the parties living arrangements indicates that the parties are in a genuine and continuing relationship, and that the parties live together, and do not live separately and apart, on a permanent basis.
19. *Social aspects of the relationship:-* I have considered the statutory declarations, statements and affidavits from family, friends and work colleagues that the review applicant and visa applicant represent themselves to other people as being married. I have considered the letters of support and the statutory declarations and the affidavits from family members and I accept the evidence presented to the tribunal is that the opinion of friends and acquaintances about the relationship between the review applicant and the visa applicant is that it is genuine and caring, and that the parties are suffering from being separate from each other. I have considered the numerous photographs provided indicate that when the review applicant was residing with the visa applicant in India the parties planned and undertook joint social activities together. I accept the evidence of the records of communication between the parties is that currently their joint activities together involve communicating regularly.
20. I accept the evidence of the social aspects of the relationship which includes the written material provided from family friends and colleagues and the photographs, indicate that the relationship between the review applicant and the visa applicant is considered to be genuine and continuing.
21. *Nature of the person's commitment to each other:-* I am satisfied that the evidence indicates the parties have been married since June 2017. I accept the duration of the marital relationship is 45 months, and the parties have lived together intermittently since that time, when the review applicant travels to India. The evidence provided to the tribunal is that the parties draw companionship and emotional support from the relationship. I accept the evidence that the review applicant has suffered psychologically from the isolation created by the covid-19 pandemic, particularly his separation from the visa applicant. I accept the visa applicant suffered a miscarriage in October 2017, and had been undergoing fertility treatment since that time. I am satisfied based on the information available to the tribunal that the parties have provided support to each other during these difficult times in their relationship. I have considered the submissions and written evidence provided in this matter. I am satisfied that the review applicant and visa applicant consider their relationship to be a long-term relationship.
22. I am satisfied that the evidence of the nature of the persons' commitment to each other indicates that the parties have a mutual commitment to a shared life as a married couple to the exclusion of all others.

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24.

25. For the above reasons, the tribunal is satisfied that it has considered the matters relevant to the circumstances of the relationship raised in r.1.15A(3)(a), (b), (c) and (d), and the tribunal has concluded that the review applicant and the visa applicant are in a spousal relationship. The tribunal is satisfied that at both the time of application and at the time of decision, based on the information available to it, the review applicant and visa applicant had a mutual commitment to a shared life as a married couple to the exclusion of all others, and they were in a genuine and continuing relationship, and they lived together, and not separately and apart, on a permanent basis. Accordingly, the tribunal finds that the visa applicant and review applicant are in a spousal relationship within the meaning of s.5F(2)(b), (c) and (d), at both the time of application and at the time of decision.



26. On the basis of the above the tribunal is satisfied that the requirements of s.5F(2) are met at the time the visa application was made and at the time of this decision.
27. Therefore the visa applicant meets the requirements of cl.309.211 and cl.309.221.
28. Given the findings above, the appropriate course is to remit the application for the visa to the Minister to consider the remaining criteria for a Subclass 309 visa.

29.

DECISION

30. The Tribunal remits the application for a Partner (Provisional) (Class UF) visa for reconsideration, with the direction that the visa applicant meets the following criteria for a Subclass 309 (Partner (Provisional)) visa:
- cl.309.211 and cl.309.221 of Schedule 2 to the Regulations.

Margie Bourke
Member

ATTACHMENT - Extract from Migration Regulations 1994

1.15A Spouse

- (1) For subsection 5F (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5F (2) (a), (b), (c) and (d) of the Act exist.
- (2) If the Minister is considering an application for:
 - (a) a Partner (Migrant) (Class BC) visa; or
 - (b) a Partner (Provisional) (Class UF) visa; or
 - (c) a Partner (Residence) (Class BS) visa; or
 - (d) a Partner (Temporary) (Class UK) visa;the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).
- (3) The matters for subregulation (2) are:
 - (a) the financial aspects of the relationship, including:
 - (i) any joint ownership of real estate or other major assets; and
 - (ii) any joint liabilities; and
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
 - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
 - (v) the basis of any sharing of day-to-day household expenses; and
 - (b) the nature of the household, including:
 - (i) any joint responsibility for the care and support of children; and
 - (ii) the living arrangements of the persons; and
 - (iii) any sharing of the responsibility for housework; and
 - (c) the social aspects of the relationship, including:
 - (i) whether the persons represent themselves to other people as being married to each other; and
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
 - (iii) any basis on which the persons plan and undertake joint social activities; and
 - (d) the nature of the persons' commitment to each other, including:
 - (i) the duration of the relationship; and
 - (ii) the length of time during which the persons have lived together; and
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and
 - (iv) whether the persons see the relationship as a long-term one.
- (4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).